STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Murphy, CJ; O'Connell and Beckering, JJ)

WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM and WAYNE COUNTY RETIREMENT COMMISSION,

Plaintiffs/Counter-Defendants/Appellees,

v.

CHARTER COUNTY OF WAYNE,

Defendant/Counter-Plaintiff/Appellant,

and

WAYNE COUNTY BOARD OF COMMISSIONERS,

Defendant/Appellant.

SC: 147296

Court of Appeals No. 308096

Wayne County Circuit Court
LC No. 10-013013-AW
Hon. Michael F. Sapala

BRIEF *AMICUS CURIAE* OF NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS (NCPERS)

(in support of Appellees, WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM and WAYNE COUNTY RETIREMENT COMMISSION)

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CONCISE STATEMENT OF *AMICUS CURIAE*

The National Conference on Public Employee Retirement Systems (hereinafter "NCPERS") is an trade association focused on the preservation, growth and stability of public retirement systems.[1] NCPERS is the largest non-profit public pension advocacy organization, representing over 550 governmental pension funds throughout the United States and Canada. Founded in 1941, NCPERS has been the principal trade association working to promote and protect pensions by focusing on advocacy, research and education regarding public-sector retirement systems. NCPERS members collectively manage nearly $3 trillion in pension assets held in trust for approximately 21 million public employees and retirees. The economic impact of public-employee retirement systems and the retirement security they provide to retirees and their families is substantial, particularly in a state such as Michigan, which first established public employee pensions more than seven decades ago.[2]

Among other activities, NCPERS speaks on behalf of its member retirement systems with respect to legislative, legal and regulatory actions through research, published studies and position papers, and the filing of *amicus* briefs. NCPERS is

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[1] General information concerning NCPERS as well as specific data regarding its activities can be found at its website: (www.ncpers.org).

[2] *See generally*, "Michigan," National Association of State Retirement Administrators (http://www.nasra.org/mi).

interested in preserving the integrity of state and local retirement systems, and is a non-profit, tax-exempt entity under Section 501(c)(6) of the Internal Revenue Code.

As a primary advocate for governmental retirement plans and millions of Americans whose financial security depends upon them, NCPERS has a stake in the outcome of this litigation. NCPERS and its member funds are impacted by litigation concerning pension rights and obligations. By virtue of its diverse background, NCPERS hopes to add a national perspective[3] to the issues in this case.

[3] In the past several years NCPERS became international in scope, with the addition of public retirement systems in Canada and Australia.

SUMMARY OF ARGUMENT

Michigan's Constitution contains unambiguous protections for public-pension rights. Unlike many other state constitutions, Const 1963, art IX, §24 specifically provides that Michigan public-pension "benefits" are protected as a "contractual obligation" by the state and its subdivisions, which shall not be "diminished *or* impaired." (emphasis added). By raiding the Inflation Equity Fund ("IEF") and appropriating "reserves" which had been dedicated to provide inflation protection for retirees, Wayne County unconstitutionally "diminished *and* impaired" benefits.

The Court of Appeals correctly held that multiple provisions of the County's 2010 Ordinance violated multiple provisions of Michigan law. Finding that the case could be resolved under PERSIA, the Court of Appeals found it unnecessary to reach the underlying constitutional issues. *Wayne County Employees Ret. Sys v Wayne County*, 301 Mich App 1, 35 n 23; 863 NW 2d 279 (2013). Had the Court of Appeals decided to invoke the protections of article IX, §24, the decision would have been supported by longstanding federal and out-of-state precedent. For example, a recent decision in Arizona, a state with a similar pension-protection clause in its state constitution, has established that cost-of-living (COLA) benefits are protected as part of the broad benefits package contractually protected from diminution or impairment.

Defined-benefit plans have a measureable and positive economic impact which should be recognized in any state which is a destination for retirees and vacationers from around the nation. Because defined benefit plans are funded on a long term basis their funded ratios will ebb and flow over time with actuarial experience. Nevertheless, defined benefit plans have weathered the storm following the worst financial dislocation since the Great Depression.

This Court should affirm the Court of Appeals' decision below.

I. CONST 1963, ART IX, §24 PROVIDES UNAMBIGUOUS PROTECTION FOR PENSION BENEFITS.

Michigan's Constitution contains broad protection for public pension rights. Article IX, §24 provides that "benefits" of each public pension plan and retirement system "shall be a contractual obligation" that "shall not be diminished *or* impaired" (emphasis added). Very few states contain such strong, explicit constitutional protection for public-pension benefits.

Since the creation of the IEF to protect retirees against the ravages of inflation in the 1980's, it had paid out "13th check" distributions annually "in varying amounts without fail." *Wayne County Employees Ret. Sys,* 301 Mich App at 7. The Court of Appeals characterized the IEF as a "reserve belonging to and vested in the Retirement System's participants as a whole, outside the reach of defendants, to be used to assist retirees and survivor beneficiaries in fighting the devaluing of the dollar by inflation." *Id.* at 35. Yet, in 2010 the Court "substantially depleted" accumulated assets that were held "in trust" in the IEF account, capped balances in the IEF, and capped aggregate IEF distributions to retirees. *Id.* at 7.

Unlike many other state constitutions[4], art IX, §24 specifically provides that

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[4] While a majority of states recognize that public pensions are protected under contract theory, only a handful of explicit protections in their state constitutions. Alicia Munnell & Laura Quinby, Ctr. for Ret. Res. at Bos. Coll., *Legal Constraints on Changes in State and Local* (listing Alaska, Arizona, Hawaii, Illinois,

Michigan public pension "benefits" are protected as a "contractual obligation". By raiding the Inflation Equity Fund ("IEF") and misappropriating "reserves" which had been dedicated to provide inflation protection for retirees, Wayne County unconstitutionally "diminished *and* impaired" benefits. A contrary holding would ignore the plain language of Michigan's explicit and strong constitutional protections and would vitiate the contractual obligation owed to public employees and retirees.

Moreover, art IX, §24 does not simply protect the "benefits" of each public "pension plan." Rather, the broad protection extends to the "pension plan *and retirement system*" (emphasis added).[5] By capturing the retirement "system" within the constitutional protections of art IX, §24, there should be no ambiguity that the IEF benefit is also protected as a key component of the "retirement system."

It is also significant that art IX, §24 broadly protects "benefits," not simply the monthly pension check initially calculated at the time of retirement. The critical anti-

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Louisiana, Michigan, and New York as states with constitutional protections for pension benefits). Only three states (Arizona, Louisiana and Michigan) contain both explicit protections for benefits combined with explicit funding requirements)(http://crr.bc.edu/wp-content/uploads/2012/08/slp_25.pdf).

[5] The title of art IX, §24, "**Public pension plans and retirement systems, obligation**," is entirely consistent with this analysis. Likewise, art IX, §24 does not simply protect the singular "benefit" that one first receives at retirement, the protection extends to the plural term, "benefits."

inflation[6] protections of the IEF should not be carved out of art IX, §24's wider protections for pension benefits. Rather, all components of the retirement system are protected as a unitary retirement benefit under art IX, §24.[7]

The deleterious effects of inflation cannot be understated. For this reason, most governmental retirement systems have a benefit mechanism for preserving a retiree's purchasing power:

> Most state and local governments provide a COLA for the purpose of offsetting or reducing the effects of inflation, which erodes the purchasing power of retirement income....Such depreciation can affect the sufficiency of retirement benefits, particularly for those who are unable to supplement their income due to disability or advanced age. Social Security beneficiaries are provided an annual COLA to maintain recipients' purchasing power. Similarly, most state and local governments provide an inflation adjustment to their retiree pension benefits.[8]

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[6] After 20 years, the real (inflation-adjusted) value of a hypothetical pension benefit falls to 62 percent of its original value using a 2.5% inflation rate. The real value of a pension benefit falls to only 51 percent of its original value using a 3.5% rate of inflation. (www.nasra.org/files/issue%20briefs/nasracola%20brief.pdf).

[7] The Court of Appeals recognized as much by suggesting, but not deciding that "the 13th-check program itself could arguably be viewed as an accrued financial benefit for purposes of the first clause contained in Const 1963, art 9, § 24, which benefit was diminished and impaired by the transfer of $32 million out of the IEF." *Wayne County Employees Ret Sys*, 301 Mich App at 35, n 23.

[8] (http://www.nasra.org/files/Issue%20Briefs/NASRACOLA%20Brief.pdf).

In addition to the protections in the first clause of art IX, §24 preserving retirement system "benefits" from diminution or impairment, the second clause of art IX, §24 further reinforces the underlying contractual obligation by providing a strong funding mechanism for the retirement system. Of the handful of states with explicit constitutional protection for pension benefits, an even smaller subset also have constitutionally mandated funding mechanisms. Yet, art IX, §24 mandates that "financial benefits" arising out of service in each fiscal year "shall be funded during that year." art IX, §24, cl 2.

Other states that have permitted modifications to pension benefits lack either of these strong and explicit protections of the Michigan Constitution. In other words, Michigan's strong funding requirements in Clause 2 of art IX, §24 flow from and complement the strong constitutional protections for "benefits" in Clause 1.

By way of example, in 2007 the United States General Accountability Office issued a report studying the status of and protections for governmental pension benefits (hereinafter the "GAO Report"). Government Accountability Office, *State and Local Government Retiree Benefits, Current Status of Benefit*

Structures, Protections, and Fiscal Outlook for Funding Future Costs, GAO-07-1156 (http://www.gao.gov/new.items/d071156.pdf). The GAO Report singled out Michigan as one of only a handful of states with constitutional protections providing that participants in a governmental retirement system have a "guaranteed right to a benefit" where "accrued financial benefits cannot be eliminated or diminished." GAO Report at p. 19. Likewise, the GAO Report recognized that Michigan was one of only fourteen states with constitutional standards directing how the retirement system should be funded. GAO Report at p. 19. Taken together, Michigan's broad reinforcing constitutional protections are only found in a subset of a minority of states.

Further reinforcing art IX, §24's contractual and funding protections for public retirement system "benefits" is the corresponding and overlapping language in Michigan's Counties Act and the Wayne County Charter. As recognized by the Court of Appeals, MCL 45.514(1)(e) requires that a retirement system provided under a charter "shall recognize the accrued rights and benefits of the officers and employees under the system then in effect" and "shall not infringe upon nor be in derogation of those accrued rights and benefits." Article VI, §6.111 of the Wayne County Charter thus mandates that amendments to the retirement system "shall not

impair the accrued rights or benefits of any employee, retired employee, or survivor beneficiary."

Accordingly, the IEF is not only protected by art IX, §24's unambiguous anti-"impairment or diminution" clause, "contractual obligation" clause, and mandatory funding protections, but also by overlapping protections of the Charter Counties Act and Wayne County Charter. Taken together, the Court of Appeals' decision protecting the legitimate expectations of members and beneficiaries to a secure retirement following a career of public service should be affirmed.

II. THE COURT OF APPEALS' DECISION WAS CORRECTLY DECIDED AND IS SUPPORTED BY LONGSTANDING PRECEDENT FROM OTHER JURISDICTIONS.

Federal[9] and out-of-state authority support affirming the Court of Appeals' decision. It is particularly illustrative to survey the results of recent pension litigation in the states with constitutional protections similar to Michigan's. As set forth below,

[9] It is unnecessary to invoke the less robust *federal* impairment-of-contract standard under Article I, Section 10 of the United States Constitution, since Michigan has seen fit to provide the broad protections of art IX, §24 of the Michigan Constitution. With regard to the "exclusive benefit" rule in the Internal Revenue Code, the County has jeopardized the tax qualified nature of the Retirement System, as will be addressed by another amicus brief. *See* 26 USC 401(a)(2)(prohibiting any part of the trust corpus or income from being "used for, or diverted to, purposes other than for the exclusive benefit" of employees or their beneficiaries).

recent decisions in numerous states[10] underscore the significance of specific anti-impairment protections in a state constitution.

Benefit Package Includes the Benefit Formula and all Benefits Arising from Membership in the Retirement System - in States with Pension Protection Clauses

In February of 2014, the Arizona Supreme Court held that the statutory formula used to calculate COLA benefits for public retirees was protected by Article 29, Section I (C) of the Arizona Constitution.[11] *Fields v Elected Officials' Retirement Plan*, 320 P3d 1160 (Ariz 2014). In attempting to unsuccessfully defend the state's transfer of COLA reserves, the state of Arizona argued that only the less protective federal impairment standard should be applied. The *Fields* court rejected this argument, holding that such a result would render Arizona's specific constitutional protections "essentially meaningless." *Id.* at 1164. The state also attempted to argue that future COLA payments were not protected as "benefits." The Court refused to contort the term "benefits" to carve out COLA benefits from the protections for "retirement system benefits," as suggested by the state. *Id.* at 1166.

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[10] As set forth above in Section I, Arizona, Illinois, Hawaii, New York and Louisiana are included in the list of seven states with specific anti-diminution or impairment language in their state constitution.

[11] Article 29, Section I (C) of the Arizona Constitution is substantially similar to Michigan Constitution art IX, §24 and states that "Membership in a public retirement system is a contractual relationship that is subject to article II, §25, and public retirement system benefits shall not be diminished or impaired."

Perhaps most importantly, the *Fields* court understood that "changing the amount of the promised benefit requires changing the formula." Therefore, the "benefit" provided under § 38-808, and protected by the Pension Clause, necessarily includes the right to use the statutory formula." *Id.* at 1166;[12] *see also Kleinfeldt v New York City Emps' Ret Sys*, 36 NY2d 95, 365 NYS2d 500, 324 NE2d 865, 868–69(1975)(including the formula utilized in calculating an annual retirement allowance under the Pension Clause); *Miller v Ret Bd of Policemen's Annuity*, 329 IllApp3d 589, 264 Ill Dec 727, 771 NE2d 431, 444 (2001)(holding benefit increases to be constitutionally protected); *United Firefighters of Los Angeles City v City of Los Angeles*, 259 CalRptr 65 (Cal Ct App 1989)(holding that amendment placing 3% cap on COLA benefits was unconstitutional as applied to employees hired prior to charter amendment). By extension, Wayne County's caps on IEF payments, the new IEF amortization caps, and the new, less-generous actuarial formula, also "diminish or impair" benefits under Const 1963, art IX, §24.

[12] According to the *Fields* court, this common-sense definition of the term "benefit" comports with the use of the term in other states that have similar constitutional provisions protecting public pension benefits. *Id.* at 1166.

Pension-Protection Clauses Prevent Depleting Monies in Existing Accounts or Otherwise Diverting Revenue

Pension-protection clauses in state constitutions have successfully held the line against efforts by state or local government to raid pension reserves used for COLA or other benefits. The Court of Appeals' decision is thus supported by longstanding case law from around the country.

For example, in *Municipality of Anchorage v Gallion*, 944 P2d 436 (Alaska 1997), the Alaska Supreme Court struck down a city ordinance which appropriated assets from two over-funded tiers of a local retirement system to pay the unfunded accrued actuarial liability in a third tier. *Id.* at 439. According to the *Gallion* court, diverting surplus accumulated monies to help a separate and distinct tier "unconstitutionally impairs vested rights of members in Plans I and II to have the actuarial soundness of those plans evaluated separately without being affected by the soundness of other plans." *Id.* at 444. The Alaska Supreme Court further reasoned that the failure to maintain the tiers as separately would "impair the ability of Plans I and II to withstand future contingencies, such as increases in plan obligations, declines in investment revenue and inability by [the Municipality of Anchorage] to fund any shortfall." *Id.* Similarly, allowing Wayne County to divert IEF reserves would run directly contrary to the reasoning of *Gallion*.

In 2007 the Hawaii Supreme Court refused to allow the diversion of $346.9 million from the state's Employees' Retirement System. *Kaho-Ohanohano v State*, 162 P3d 696 (Hawai'i 2007). Article XVI, Section 2 of the Hawai'i Constitution, not unlike the Michigan Constitution, provides that "Membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired." Interpreting its pension-protection clause, the court held that it protects "not only system member accrued benefits, but also as a necessary implication, protects the sources for those benefits." *Id.* at 733; *see also Sgaglione v Levitt*, 375 NYS2d 79; 337 NE2d 592, 594 (NY Ct App 1975).

The avoidance of financial obligations to retirees by diverting funding or dedicated revenue sharing has also been firmly rejected as contrary to the contract and property rights of plan participants. *See, e.g., Louisiana Municipal Ass'n v State*, 893 So2d 809 (La 2005)(refusal to fund employer obligations in the face of rising costs was an impairment of constitutionally guaranteed rights of participants); *Firefighters' Ret Sys v Landrieu*, 572 So2d 1175 (La App 1st Cir 1991)(pension funds were entitled to funding that legislature sought to abolish); *City of Miami v GH Carter*, 105 So2d 5 (Fla 1958)(holding that public-safety plans were entitled to dedicated excise taxes

which could not be diverted to another retirement system for non-public safety employees).

Similar efforts to otherwise reduce state funding obligations have also been rejected. *See, e.g., McDermott v Regan*, 624 NE2d 985, 989 (NY Ct App 1993)(alteration of actuarial funding methodology to create a surplus thus eliminating employer contributions impairs the rights of members to a secure[13] retirement plan); *Sgaglione*, supra, 337 NE2d at 594 (NY Ct App 1975)(holding that necessarily implied in the New York pension-protection clause is the protection for "the sources of funds for those benefits"); *Calabro v City of Omaha*, 531 NW2d 541 (Neb 1995)(elimination of supplemental pension plan without an offsetting advantage impairs the obligation of contract); *Cloutier v State*, 42 A3d 816 (NH 2012)(alteration of judicial pensions from standards in place at the commencement of office is an impairment of contract); *Nash v Boise City Fire Dept*, 663 P2d 1105 (Idaho 1983)(lowering COLA cap was invalid when retirement plan was neither insolvent or unable to meet its obligations).

The Oregon Supreme Court in *Strunk v PERB*, 108 P3d 1058, 1097 (Or 2005) considered a temporary suspension of annual COLA payments to retirees created by

[13] According to the *McDermott* court, the challenged amendment impaired "the means designed to assure benefits" and depleted moneys in the existing pension fund by allowing employer credits against fund balances. *Id.* at 989.

alteration of the rate credited to member contribution accounts. The *Strunk* court recognized that even a temporary change was an impairment of the retirees' pension contract.

The misappropriation of COLA money was expressly disapproved in *Wisconsin Retired Teachers v Employee Trust Funds*, 207 Wis2d 1; 558 NW2d 83 (Wis 1997). In an effort to plug a budget gap, the Wisconsin legislature adopted a measure which altered the COLA methodology for retirees. The result was a transfer of funds used for post 1974 retirees to fund a benefit previously paid by general budgetary allocations. The effect of the law was to reduce the benefits of both pre and post 1974 retirees, while relieving the state of $230M in budgetary expenditures. The court found this to be an unlawful taking of property without just compensation. *See also Association of State Prosecutors v Milwaukee County*, 544 NW2d 888, 894; 199 Wis 2d 549, 563 (1996)("we hold that vested employees and retirees have protectable property interests in their retirement trust funds which the legislature cannot simply confiscate under the circumstances of this case").

In *Claypool v Wilson*, 6 Cal Rptr2d 77 (Cal Ct App 1992), the court approved a legislative program which replaced a performance-based COLA applicable only to certain retirees with a fixed-rate COLA for all plan participants. To be held

reasonable, the court noted that any disadvantages had to be offset by comparable new advantages.

The development of the concept of a reasonable alternative, begun with *Claypool*, was further developed by the same court in *Teacher Ret Bd v Genest*, 154 Cal App 4th 1012; 65 Cal Rptr3d 326 (Cal Ct App 2007). In *Genest*, the court disapproved a reduction in COLA benefits finding that no comparable advantage was simultaneously created offsetting the loss. In *Genest* the "Supplemental Benefit Maintenance Account (SBMA)" was used to provide inflation protection for retirees. Not unlike the IEF funds held in trust, the SBMA funds were statutorily required to "remain" in the SBMA account "for allocation in future years." *Id.* at 332.

The court noted that while assisting the public fisc is not unreasonable, it is not enough to justify the destruction of vested contract rights of retirees. *Id.* at 344; *see also, Bakenhus v City of Seattle*, 296 P2d 536, 540 (Wash 1956)(public employee pensions are not a mere gratuity but are deferred compensation for services rendered and thus modifications which are disadvantageous should be accompanied by comparable new advantages). No new benefits were created by Wayne County simultaneous with the 2010 benefit reductions, which would thus be invalid under reasoning of *Claypool* and its progeny.

In *US Trust v New Jersey*, 431 US 1; 97 S Ct 1505; 52 L Ed 2d 92 (1977), the United States Supreme Court held that "a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *Id.* at 1516 n 14. In addition, "statutes governing the interpretation and enforcement of contracts may be regarded as forming part of the obligation of contracts made under their aegis." *Id.* The *U.S. Trust* Court concluded that "[a] state may not refuse to meets its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *Id.* at 1521.

As the Second Circuit has noted, holding government to its contracts with its officers and employees is a concept as old as the Republic itself. When the legislature makes a contract with a public officer, this "is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens." *Association of Surrogates v State*, 940 F2d 766, 774 (2d Cir 1991)(citing *Dartmouth College v Woodward*, 17 US (4 Wheat) 518, 694 (1819)(Story, J., concurring)).[14]

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[14] In Federalist No. 44, Madison eloquently notes the evils of government interference with its own contracts:

> The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal

Any contrary authority cited by the County must be evaluated as to whether the challenged impairment involved merely temporary measures which operated prospectively only, or permanent open-ended impairments that apply to retirees along with vested employees. Likewise, it is important to properly distinguish cases that replaced one form of benefit with a new corresponding benefit or commitment, neither of which is implicated in this case, since the 2010 ordinance merely capped benefits and appropriated reserves. *See Teacher Ret. Board v Genest*, 65 Cal Rptr3d 326 (Cal Ct App 2007). Lastly, not all retirement systems require contributions from the membership. The Court of Appeals recognized, however, that the IEF was funded with assets of the defined-benefit plan "which include contributions by the Count and its employees, and the investment earnings thereon." *Wayne County Employees Ret. Sys*, 301 Mich App at 6.

While states differ as to when pension rights attach, pension obligations are generally protected from contractual impairment when they do. *See, e.g., Mascio v*

> rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

PERS of Ohio, 160 F3d 310 (CA6, 1998)(what is a small change to government is not necessarily a small change to the pensioner); *AFSCME v City of Benton*, 513 F3d 874 (CA8, 2008)(termination of vested post-retirement benefits impairs contract clause); *Professional Firefighters Ass'n of Omaha v City of Omaha*, 2010 WL 2426446 (D Neb 2010)(goal of saving taxes does not outweigh the sanctity of contract in the absence of an "unprecedented emergency"); *Maybourg v City of St Bernard*, 2006 WL 3803393 (SD Ohio 2006)(suspension of pension benefits without individualized consideration of the impact denies substantive due process).

Accordingly, both federal and state law support affirmance of the Court of Appeals' decision.

III. DEFINED-BENEFIT PLANS HAVE A POSITIVE ECONOMIC IMPACT, ARE FUNDED ON A LONG-TERM BASIS, AND HAVE WEATHERED THE STORM FOLLOWING THE WORST FINANCIAL DISLOCATION SINCE THE GREAT DEPRESSION.

Benefits paid by governmental pension plans support significant economic activity in Michigan. According to the National Institute on Retirement Security, expenditures made by retirees of state and local government provide a steady economic stimulus to Michigan communities and the state economy. "In 2012, 360,181 residents of Michigan received a total of $7.4 billion in pension benefits

from state and local pension plans."[15] Moreover, "between 1993 and 2012, 27.88% of Michigan's pension fund receipts came from employer contributions, 9.21% from employee contributions, and 62.92% from investment earnings." *Id.* In a state such as Michigan, where retirees from across the country look to retire or vacation, the importance of this retirement income cannot be overstated.[16]

As described in the academic literature studying retirement systems, defined-benefit plans are funded on a long-term basis and the funding ratio will fluctuate over time with plan experience:

> What makes retirement programs much different from other entitlement programs or benefits is the *considerable length of time between when the funds are deposited into the account, and when the benefits are actually paid out.* For a new employee at age 25, benefits earned based on a year of service now will not be eligible for payment for up to forty years into the future at age 65. Then if annual pension payments are made, it may be another twenty years or more before the pension system is no longer obligated to make any further payments to the employee or beneficiary. Thus, the average time horizon for an employee entering

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[15] *Pensionomics 2014: Measuring the Economic Impact of DB Pension Expenditures* (http://www.nirsonline.org/storage/nirs/documents/factSheets Previews/Factsheet_MI.pdf).

[16] Retirees' expenditures from these pension benefits supported a total of $12.7 billion in total economic output in Michigan. Each dollar "invested" by Michigan taxpayers in these plans supported $1.72 in total economic activity in the state. *See*

(http://www.nirsonline.org/storage/nirs/documents/factSheetsPreviews/Factsheet_MI.pdf) (http://en.wikipedia.org/wiki/Michigan_Office_of_Retirement_Services).

a retirement program is generally at least twenty and often sixty or more years (emphasis added).[17]

It should be recognized that the funded status of defined-benefit pension plans "tends to ebb and flow over time with the ups and downs of asset markets, interest rates, and other macroeconomic factors."[18] As a general rule, the funded status for all retirement systems (the ratio of existing plan assets to current and future benefits) fell in the wake of the downturn in financial markets over the past decade. *Id.* Nevertheless, through the application of funding discipline and the actuarial funding of retirement systems, most public pension plans remain fundamentally stable.

As acknowledged by the Government Accountability Office, funded ratios have trended lower across the country due to market declines, but "[a]lthough pension plans suffered significant investment losses from the recent economic downturn, which was the most serious since the Great Depression, most state and local government plans currently have assets sufficient to cover their benefit commitments

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[17] Karen Steffen, *State Employee Pension Plans* in PENSIONS IN THE PUBLIC SECTOR 45 (Olivia S. Mitchell & Edwin C. Hustead eds., Pension Research Council, Wharton School of the University of Pennsylvania, 2001).

[18] Beth Almeida, Kelly Kenneally & David Madland, *The New Intersection on the Road to Retirement*, THE FUTURE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS 298 (Olivia S. Mitchell & Gary Anderson, eds.,The Pension Research Council, Wharton School of the University of Pennsylvania, 2009).

for a decade or more."[19] Following 2008, improvements in investment earnings have helped plans recover losses. More importantly, "public pension plans have built up assets over many years through prefunding" of employer and member contributions. *Id.*

According to a recent report by the National Association of Retirement Administrators ("NASRA"):

> Although public pension funds, like other investors, have experienced sub-par returns in the wake of the 2008-2009 decline in global equity values, median public pension fund returns over longer periods meet or exceed the assumed rates used by most plans.[20]

The NASRA report further indicates that public pension plans "operate over long timeframes and manage assets for participants whose involvement with the plan can last more than half a century." Thus, for the twenty-five year period that included three economic recessions, public plans have generally exceeded their assumed rates of investment return and have acted as strong stewards for their beneficiaries and taxpayers. *Id.*

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[19] Government Accountability Office, *State and Local Government Pension Plans, Economic Downturn Spurs Efforts to Address Costs and Sustainability*, GAO-12-322 at 7 (http://www.gao.gov/assets/590/589043.pdf).

[20] NASRA Issue Brief: Public Pension Plan Investment Return Assumptions, April 2014 (http://www.nasra.org/files/Issue%20Briefs/NASRAInvReturnAssumptBrief.pdf).

The Center for Retirement Research at Boston College in 2012 warned that more than half of American households are at risk of not having enough retirement savings to maintain their standards of living in retirement.[21] NCPERS respectfully argues that Wayne County retirees have a right to rely on the bedrock constitutional protections in Michigan law for public-sector retirees - along with the overlapping protections set forth in the Michigan's Counties Act and the Wayne County Charter - to secure their retirement security after a career of public service.

[21] National Retirement Risk Index: An Update, October 2012, Number 12-20, (http://crr.bc.edu/wp-content/uploads/2012/11/IB_12-20-508.pdf).

CONCLUSION

Michigan's Constitution and applicable pension statutes contain unambiguous protections for public-pension rights. The Court of Appeals correctly held that the County misappropriated $32,000,000 from the IEF and violated multiple PERSIA provisions. This Court should affirm the decision below.

Respectfully submitted,

KLAUSNER, KAUFMAN, JENSEN & LEVINSON

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